REMARKS

This submission is made in response to the Office Action of November 4, 2003 which pointed out that applicants' previous response received in the Office on August 18, 2003 failed to address the statutory double patenting rejection under 35 U.S.C. §101 based upon the claims in co-pending application no. 09/782,752. With respect to this rejection, applicants would respectfully submit that there clearly is no issue of statutory double patenting (35 U.S.C. §101) should the claims of application no. 09/782,752 issue as a patent. In this regard, attention is respectfully invited to *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970), which addresses the issue of "same invention" double patenting. In addressing the statutory double patenting issue, the court stated two questions to be considered in a double patenting analysis. The first question, relating to statutory double patenting under 35 U.S.C. §101 and thus not appropriate for the filing of a terminal disclaimer is as follows:

> "Is the same invention being claimed twice?...'invention' here means what is defined in the claims...By 'same invention' we mean identical subject matter." (164 USPQ 621)

As addressed in *In re Vogel*, the test for "same invention" is clearly whether or not identical subject matter is being claimed. If identical subject matter is not being claimed in both cases, there is no "same invention" and there is no issue of double patenting under 35 U.S.C. §101 and the analysis then moves to the second questions which addresses "obviousness type" double patenting.

The Vogel test is followed in MPEP §804(II)(A), "Statutory Double Patenting - 35 U.S.C. 101." As stated there, "Same invention' means identical subject matter." (citing cases) This section of the MPEP then goes on to apply the Vogel test:

> "A reliable test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. *In re Vogel*, 422 F.2d 438, 164 USPQ 619

(CCPA 1970). Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting would not exist."

In this application and in co-pending application no. 09/782,572, the same subject matter clearly is not being claimed. In this application, each of the independent claims requires that the alumoxane cocatalyst incorporated on the support particles is "predominantly on the external surface thereof." (See independent claims 1 and 25.) The claims in serial no. 09/782,752, on the other hand, preclude this characteristic as set forth in the claims of this application and instead call for an alumoxane cocatalyst within the internal pore volume of the support particles. Thus, independent claim 1 of 09/782,752 recites in subparagraph (a), "...silica particles impregnated with an alumoxane cocatalyst with at least one-half of said cocatalyst disposed within the internal pore volume of said silica particles;" Independent claim 23 of serial no. 09/782,752 calls for in subparagraph (a), "...spheroidal silica particles having an average pore size within the range of 20-60 microns and an average effective pore diameter within the range of 200-400 Angstroms;" in subparagraph (b), "contacting said particulate support material with an alumoxane cocatalyst in an aromatic carrier liquid;" and in subparagraph (c), "heating said mixture...for a period sufficient to fix said alumoxane on said particulate support material with at least one-half of said cocatalyst disposed within the internal pore volume of said silica particles;" As can be seen by the foregoing, the Vogel test for "same invention" is not met. There is no statutory double-patenting issue involved in this application and application serial no. 09/782,752. Further, in view of the distinct differences in claimed subject matter as pointed out above, there would not appear to be an issue of obviousness type double patenting evidenced in the claims of the two applications. However, even should obviousness type double patenting be present, giving rise to a provisional obviousness type double patenting rejection, under the

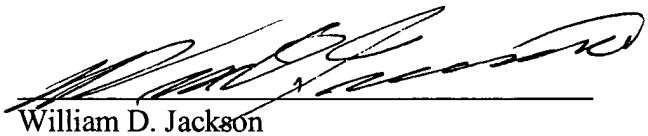
procedure set forth in MPEP §804(I)(B), when the provisional double patenting rejection in one application becomes the only rejection remaining, it should be withdrawn and the case passed to issue. Should there be a provisional double patenting application in the other application, the provisional rejection would become an actual double patenting rejection upon the issuance of this application as a patent.

While it is doubtful that even an obviousness type double patenting rejection would be involved given the distinct differences in claimed subject matter, it is noted that a terminal disclaimer has already been submitted in copending application serial no. 09/782,752.

For the reasons set forth in this response and applicants' previous response received in the office August 18, 2003, this application would now appear to be in condition for allowance and such action is respectfully requested.

The Commissioner is authorized to charge any fee required in connection with the submission of this document to the Locke Liddell & Sapp LLP deposit account no. 12-1781.

Respectfully submitted,



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